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SUPREME COURT OF THE UNITED STATES

No. [redacted]
112

GEORGE W. DOTSON, - - - - - Petitioner,

versus

BERTHA DUTY - - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Pikeville, Kentucky,
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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES,

No. _____

GEORGE W. DOTSON, - - - - - *Petitioner,*

v.

BERTHA DUTY, - - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The Petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW.

The opinion of the Court of Appeals has been published in 406 F. 2d 816. It is appended hereto (Appendix A, pages 9-11).

On February 14, 1969, the Court of Appeals for the Sixth Circuit decided this appeal and entered its opinion.

There was no rehearing and no extension of time for this petition.

JURISDICTION.

Petitioner claims jurisdiction to grant certiorari is conferred by 28 USC 1254(1).

QUESTION PRESENTED.

The Respondent was found to have testified falsely in the United States District Court for the Eastern District of Kentucky, when she stated, under oath, that she had not held employment because she was totally disabled from the time of her injury to the date of the trial, a period of more than four years.

When Petitioner learned of her employment for a period approaching a year and of her drawing unemployment compensation for two periods of six months, all during the interval covered by her testimony, he made this misconduct one of the grounds of his motion for judgment notwithstanding the verdict and alternatively for a new trial. The trial Court ruled on this situation by awarding the Respondent a final judgment against the Petitioner on the disputed issues affecting his liability to Respondent. The Court gave Petitioner a new trial upon only the single issue of how much he should pay.

During the examination of the jurors on *voir dire* two members of the panel admitted that they were then engaged in the prosecution of claims for personal injuries from automobile accidents, the same type claim that Respondent was prosecuting against Petitioner.

Petitioner moved the Court that he be allowed to challenge for cause on this ground. Petitioner's motion was denied.

The question is whether allowance of final judgment establishing Petitioner's liability on testimony admittedly perjured and whether effective denial of Petitioner's right to three peremptory challenges allowed by 28 USC 1870, sanctioned by the opinion of the Sixth Circuit, is such a departure from the accepted and usual course of judicial procedures as to call for exercise of this Court's power of supervision.

STATEMENT OF CASE.

This action was filed in the United States District Court for the Eastern District of Kentucky upon the ground that the Plaintiff, Bertha Duty, was a citizen and resident of Columbus, Ohio, while the Defendant, George W. Dotson, was a citizen and resident of Pike County in the Eastern District of Kentucky. The amount of her claim for injuries in an automobile accident exceeded the minimum required for the Court to entertain jurisdiction on the ground of diversity of citizenship.

The case was tried three times. The first verdict was set aside *in toto*. The second trial was set aside as to damages, but was allowed to stand as to liability. At the second trial, on February 21, 1966, at Pikeville, Kentucky, in the United States District Court for the Eastern District of Kentucky, the Respondent testified, under oath, that she had been totally disabled from

June 26, 1961, as a result of a highway accident occasioned by two employees of Petitioner (Appendix C, pages 13-20). After verdict in Respondent's favor, Petitioner filed motion for new trial and for judgment n.o.v.

Before these motions were ruled on Petitioner discovered that Respondent had sworn falsely about her disabilities. Petitioner learned that while living in Columbus, Ohio, the Respondent had worked for at least two employers and had drawn unemployment compensation by making periodic statements that she was able and available for work and that the total of her period of employment and her eligibiltiy to employment compensation amounted to a little less than two years—almost one-half the period she claimed to have been totally disabled.

Petitioner filed motion alleging this misconduct as a further ground for new trial (Appendix E, pages 25-26). At the hearing on this motion Respondent's attorney admitted that Respondent had sworn falsely on the witness stand (Appendix G, pages 29-30).

Respondent's criminal violation of the duty owed to a court of justice was not punished by criminal sanction. It was not punished by rebuke or criticism, it was not punished by any disadvantage in the prosecution of her claim. Actually, she was rewarded by a final adjudication against Petitioner on the disputed question of liability and Petitioner was compelled, over his objection, to go through another trial upon which the only question was the amount of Respondent's recovery.

At the same trial the Court refused to strike for cause two jurors who admitted they were prosecuting personal injury claims. Petitioner thus was forced to use two-thirds of his peremptory challenges to remove the two from the box.

ARGUMENT.

On the second trial Petitioner's motion to challenge prospective jurors, Lacy Patrick and Paul Bickford, was made because each admitted on *voir dire* that he was then prosecuting a claim for personal injuries in an automobile accident (Appendix B, page 12).

The Court of Appeals considered the point in these terms:

> "The most serious question presented on the appeal is whether the District Judge committed reversible error at the beginning of the second trial in refusing to sustain defendant's challenge for cause against the seating of two prospective jurors who at that time were plaintiffs in pending lawsuits" (Appendix A, page 10).

The opinion on appeal weighed this point in these terms:

> "The action of the District Judge in rejecting these challenges for cause under some circumstances could have constituted reversible error and we think it would have been better practice in this case for these two challenges for cause to have been sustained" (Appendix A, page 11).

It was after the critical comment above quoted that the appellate court ruled in this case.

Certainly the Court had in mind the unconditional statement, "In civil cases each party shall be entitled to three peremptory challenges." 28 USC 1870.

It was after declining to comment, in any manner, on Respondent's freedom from restraint under oath that the Court ruled.

Parenthetically in this connection the record shows that when, on the first trial, Respondent testified to a period of inability to work and consequent unemployment from June 26, 1961, to October 1, 1964 (Transcript of Evidence, Item No. 80, Questions 84-89, pages 13-14), she was at that time employed by a firm known as Forrest Towel Service and this employment extended for a period of six months before and after her testimony.

It is shown in the record that at the time of this testimony she had already completed drawing unemployment compensation for one maximum period of six months by periodically certifying throughout the period that she was able and available for work.

It was in this light that the learned Court of Appeals ruled by saying:

> "Under the facts of the present case, however, we find no prejudice to defendant resulting from the rejection of the challenges and therefore decline to reverse on this ground."

A type of reasoning which would appear to justify a ruling that one charged with murder should be re-

lieved of penalty because the victim was bound to die some day anyhow.

Certainly the learned appellate court had in mind the provisions of 18 USC 1621, which condemns as a felony testimony known to be untrue.

Shall these departures from the accepted and usual standard of truth and statutory procedures applied to judicial procedures be sanctioned. We respectfully submit that they should not be and that this petition should be granted.

JEAN L. AUXIER,
First National Bank Building,
Pikeville, Kentucky,

Attorney for Petitioner.

CERTIFICATE OF SERVICE.

It is hereby certified that the foregoing Petition has been served upon the opposing counsel by mailing a copy thereof to Jack T. Page, Esquire, Pikeville, Kentucky, and to the Honorable Bernard T. Moynahan, Jr., Federal Building, Lexington, Kentucky.

This 12th day of May, 1969.

Jean L. Auxier

JEAN L. AUXIER,
Attorney for Petitioner.